(4)

No. 90-696

In The

Supreme Court of the United States

October Term, 1990

LEO HEIDEMAN and SHIRLEY HEIDEMAN,

Petitioners,

vs.

PFL, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

"Yes," there are "special and important reasons" for granting a Writ, as petitioners' "Questions Presented" concisely show. Note that respondent states the facts in *its favor,* so that the inattentive reader might be hypnotized into believing this simply is a dispute over facts – which everyone knows this Court will not review. This ploy might work *if there had been a trial.* The attentive reader of course will realize that the very difference between petitioners' version and respondent's version of the case *compellingly proves the need to review this case,* because factual issues were resolved *against* petitioners in violation of *all* summary judgment standards and the Seventh Amendment.

1. The Proceedings Below

Respondent begins with its demonstrably false argument that somewhere along the way this proceeding changed from a summary judgment determination into some type of "mini-trial." *No such thing occurred.*[1] The fact respondent finds it necessary to make up such an argument is wonderfully revealing, however, because it shows *respondent recognizes the trial court went too far,* and, indeed, weighed and decided factual issues – which should not have been done on a motion for summary judgment.

Second, respondent's repeated theme that the parties "stipulated" to *certain* facts also is a subtle and misleading attempt to lull the reader into thinking that the stipulation constituted all of the facts before the court. *It did not.* The stipulation was only a partial rendering of the facts, because all of the depositions were before the district court (see district court's Memorandum and Order); both parties filed affidavits; and a key part of the record which is *nowhere mentioned* in respondent's brief is the "Report on Statute of Limitations Issues," which, by the district court's order contained those additional parts of the record which the plaintiff considered "material" for summary judgment, but on which

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[1] This argument was first thought up and raised by the respondent *after submission of the case* to the Eighth Circuit – and the Eighth Circuit in its opinion specifically rejected this argument. (A7-10).

defendant/respondent *refused to stipulate*.[2] Plaintiff's report contains nineteen (19) additional paragraphs full of factual materials which presumably were "considered" by the district court, but not in plaintiff's favor.

Even if all facts had been stipulated, if different inferences might reasonably be drawn from the facts, the case *must* go to the jury "which weighs the contradictory evidence and inferences and draws the ultimate conclusion as to the facts." See *Continental Ore Company v. Union Carbide and Carbon Corporation*, 370 U.S. 690, 700-701 (1962); *Tennant v. Peoria & Pekin Union Railway Company*, 321 U.S. 29 (1944).[3]

2. The Facts

In this section, the key for this Court is to note how petitioners' statement of relevant facts *differs from* respondent's. This difference should have been tilted in plaintiff's favor, but was not. The district court and the Eighth Circuit followed respondent's lead by wrongly "searching the record for conflicting circumstantial [and direct] evidence" which was used against plaintiff "to take the case away from the jury . . . . " *Tennant v. Peoria*, supra, 321 U.S., at 35. Both courts sanctioned a violation of Rule 56, and improperly turned this case into a "paper trial," which is *specifically disavowed in this Court's* Rule 56 trilogy.

Respondent's third paragraph begins with Heideman's feeling he had not been told the real reason for his separation, and that he was "being lied to at the time of termination." Petitioner's Statement of Facts shows that is all Heideman felt or believed *back in*

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[2] The district court's Memorandum and Order specifically alludes to the reports and the depositions as matters considered in ruling the summary judgment. (A33-34). But there were key facts favorable to plaintiff contained in the report – all of which should have been construed in plaintiff's favor – which nowhere appear in the district court or Eighth Circuit opinions.

[3] Several factual issues improperly resolved against the plaintiff were not subject to any stipulation: 1) did defendant take action designed to conceal its misdeeds; 2) did the plaintiff "reasonably rely" on the defendant and act as a "reasonable man" in his actions and inactions?

1979. Defendant omits that Heideman's feelings that he had been "moved and deceived" first came to him in August 1986, well within the statute of limitations. (Heideman Depo. 120-123).[4]

In the very next paragraph, on page 7, respondent misstates more material facts, by stating that Heideman contacted an attorney but decided not to pursue the matter further, "*primarily because* of the cost involved in retaining an attorney." The stipulation cited by the defendant does not contain the word "primarily." Moreover, respondent's one-sided characterization omits the material facts testified to by plaintiff (See Petition at 9 – 11) that Heideman was told he "didn't have anything to stand on," he "had no legal recourse," and, most importantly – *until receipt of the* "Hill Memorandum," Heideman never felt he had any way of disproving the misleadingly vague reasons Parr had given for the termination. (Heideman Depo. 175-178).[5]

I. THE ISSUES PRESENTED BY THIS CASE ARE SUFFICIENTLY IMPORTANT OR NOVEL TO WARRANT REVIEW BY THIS COURT.

Respondent's argument summary uses a bit of reverse psychology by painting this as a "garden variety" limitations case that has nothing going for it but "sympathies." Nonsense. What it has are facts, law and equities favoring petitioners, and yet the courthouse doors have been closed before they got a chance. Respondent also has the audacity to urge this Court to avoid taking this case, because "harsh facts have the potential to make bad law." This Court is the *only* Court whose very purpose is to take on the hard facts and apply the law. If not this case, which one? If not now, when?

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[4] The statement "moved and deceived" comes directly from a letter from Heideman to PFL owner, Jeno Palucci, dated *August 23, 1986*. The deposition testimony is too lengthy to set out here, but the point is this isolated fact has been misleadingly used *against* Heideman instead of allowing the full context and import to be developed *at trial*, as our procedures require.

[5] Many *additional favorable facts omitted* by respondent (and courts below) appear in "Plaintiff's Report on Statute of Limitations Issues."

Petitioner's argument is *not* that the law regarding tolling is "unsettled." There is a *clear conflict* among circuits, which could not be better exemplified by comparing the cases cited in respondent's footnote 1 with those cited and discussed by petitioner at pages 19 through 24 of his brief. What is "unsettling" is the arbitrary manner in which summary judgment was applied in this case to deny the plaintiff his Seventh Amendment right to a jury resolution of factual issues, whereas in other circuits (and even in the District of Minnesota, which is in the Eighth Circuit) Mr. Heideman, no doubt, would be entitled to his day in court. Such whim and caprice raises the type of "special and important issues" which this Court is designed to prevent.[6]

II. THIS CASE WAS NOT CORRECTLY DECIDED ON SUMMARY JUDGMENT AND ON APPEAL.

After repeating the innocuous fact there was a *partial* stipulation, PFL next eases into the following false statement:

> Hence, the usual limitations of summary judgment, such as where there are credibility issues or disputed issues of fact, are non-existent here since the parties agreed upon virtually all of the facts material to the summary judgment motion, and further agreed that the depositions and deposition exhibits could be given the same weight and consideration by the court as if the testimony exhibits were presented live at an actual trial on the tolling issue.

Any "agreement" to use depositions and exhibits does nothing more or less than verbalize and apply Rule 56. It does *not* mean the parties somehow agreed to *pretend* testimony actually was presented live when it was *not*. Most important, the Eighth Circuit flatly rejected respondent's attempt to magically change this case from a "garden variety" summary judgment under Rule 56 to an

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[6] See *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443, at 450 (1957) (This Court is "vigilant" to review "any case where it appears" litigants have been deprived of a jury trial); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (reversing summary judgment); *Gallick v. Baltimore & Ohio Railroad Company*, 372 U.S. 108 (1963) (This Court, per Justice White, granted cert. "to consider the question whether the decision below improperly invaded the jury's function.").

imagined trial reviewed under Rule 52(a). (See A10). Respondent's citing of this Court's "summary judgment trilogy" is interesting, because this Court's trilogy expressly disavowed any intent to allow courts to resolve cases by "paper trial" or "trial by affidavits."[7] In *Anderson*, this Court emphasized that the trial judge's function is to not weigh the evidence and determine the truth of the matter, but to determine "only whether there should be a trial." 106 S.Ct., at 2511. *Anderson* could not be clearer in warning the lower courts that the summary judgment holdings by no means authorize "trial on affidavits." 106 S.Ct., at 2513-14.

Respondent's argument at pages 13 through 23 provides a convenient compendium of *law conflicting with that cited in petitioners' brief*. Only this Court can decide what view is right.

Respondent cites *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), urging that only sympathy would allow the Heidemans their day in court. Petitioners can only hope this Court will see this condescending argument for what it really is – an insidious attempt to turn the outrageousness of petitioners' plight *against* them by mental jujitsu. The intended result is the reader believes the magnetic force of petitioners' plight is not based on compelling logic, plus well-entrenched legal grounds, but on "untrustworthy" emotions. Petitioners' right to have a jury trial rests on sound legal principles of federal law; petitioners respectfully suggest that what one feels when reading about petitioner's tortuous journey to nowhere is a sense of disbelief and perhaps outrage that the judicial process could lead to such a result.

At 16-17, PFL presses its "opening the floodgates" distortion of petitioners' tolling argument. This powerful intoxicant (wrongly embraced by the Eighth Circuit) fails for the reasons set out at 52-55 of this Petition. This is a clear case of affirmative misconduct *plus active concealment* by the employer, which was a fact easily and clearly recognized by the Minnesota District Court, which preserved the causes of action for the five employees who filed later than Heideman and *nine years after their termination*.

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[7] This case glaringly illustrates just how the lower courts are being persuaded daily to go farther than this Court intended.

This is the "rare case" where there is proof positive, not only of (1) a plan to discriminate in violation of the ADEA, but also (2) proof of a plan to mislead the employees and thereby *conceal the discriminatory plan itself.* The law of tolling is specifically designed to step in to relieve the petitioner from the consequences of not discovering earlier the defendant's blatantly illegal, expressly concealed scheme of discrimination. *At the very least,* the remedial, humanitarian purpose of the ADEA would compel that the courthouse doors remain open for those plaintiffs to *try to prove* their claims and recover for defendant's plainly exposed wrongs. The Eighth Circuit opinion here does not accept this view; the opinions in other circuits expressly endorse it. Only this Court can resolve such apparent conflict and caprice.

At page 18, PFL makes a statement disproved by the record (See Petitioners' brief), but improperly used *against* petitioners in the courts below: "Here, Heideman did not rely on anything respondent said or did." Such a material misstatement of a disputed fact, if resolved against the plaintiff, would be sufficient *standing alone* to compel that certiorari be granted to reverse the improper rendition of summary judgment.[8]

Here are just some of the *contrary* facts which raise a disputed triable factual issue, totally contrary to respondent's assertion that Heideman "did not rely on anything respondent said or did":

> Heideman believed Hill's statements at the time of his transfer to the Memphis region, that Hill simply wanted to have his own men serving as vice presidents of defendant. (Heideman Depo. 56-58, 122) (Plaintiff's Report, ¶ 3); Heideman "accepted as sincere" Hill's statement that Hill wanted individuals selected directly by him to serve as divisional vice presidents and report directly to him. Heideman accepted as plausible the reasons stated for the demotion and move from Kansas City to Memphis. (Heideman Depo. 43-44, 67-70, 122)

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[8] See *Dick v. New York Life Insurance Company,* 359 U.S. 437, at 444 (1959), wherein this Court reversed the appeals court because it "resolved *at least one* disputed fact in respondent's favor." (Emphasis added).

> (Plaintiff's Report, ¶ 4). Even though Heideman felt the reason Parr gave him for termination was not the real reason, *until he received the Hill Memorandum, Heideman never felt he had any way of disproving what Parr had told him about the reason for termination.* (Heideman Depo. 175-178) (Plaintiff's Report, ¶ 18).

At the top of page 19, respondent quotes the stipulation regarding the visit to the attorney's office, without noting those portions of Heideman's testimony which should have been construed in his favor, that the attorney told him he "had no recourse," causing Heideman to decide under those circumstances that it did not make sense to pursue what looked like a futile matter. Whether Mr. Heideman was "reasonable" in concluding like he did *is a matter for the jury* and does involve his credibility.[9]

Respondent tries to distinguish *Meyer v. Riegel Products Corporation* and *Richards v. Mileski* on the basis that the plaintiffs therein "demonstrated actual reliance on alleged misrepresentations by the employer." Did they? The point of this Petition is *Meyer* stands for the proposition that whether the plaintiff actually relied on the alleged misrepresentations by the employer *is a question of fact* which must be resolved at trial, and is totally inappropriate for summary judgment.

Most glaringly, respondent cannot dodge the totally opposite decision rendered by another district judge in the Eighth Circuit in the five Minnesota cases. Respondent tries to point to the "stipulated factual record"; but petitioner has shown how the stipulation itself does not contain all of the facts and, most importantly, some of those stipulated facts were construed against him below. Respondent also states that Judge Magnuson "goes to great lengths to distinguish" Heideman. What respondent omits is that this same defendant argued in the Minnesota action "that Heideman is indistinguishable from the instant case." (See Magnuson Decision, A92). The undeniable point of Judge Magnuson's decision is that it constitutes irrefutable proof that the evidence does not point all one way in defendant's favor, since two "reasonable minds" (District

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[9] In short, the actual record totally disproves respondent's argument that "the stipulation of the parties regarding the facts of this case *says it all.*"

Judge Oliver and District Judge Magnuson) reached *opposite conclusions* on facts and law that this same defendant called "indistinguishable." It is notable that Judge Magnuson, in "distinguishing" the *Heideman* case, had before him only the district court opinion in *Heideman*, which itself stated facts, drew inferences and made conclusions *against the plaintiff*. The reason Judge Magnuson's decision is so momentous is that he properly overruled summary judgment for the same reasons which *should have been controlling in this case:*

> At the summary judgment stage, the court is compelled to view the record in the light most favorable to the non-moving party. Having done so, the court is unable to say that no issues of material fact remain to prevent defendants from being entitled to judgment.

(See Judge Magnuson's Decision, at A98).

At page 23, respondent mischaracterizes petitioners' argument to be that "the offensive nature of the Hill Memorandum itself establishes that tolling is appropriate." Respondent also falsely argues that the Hill Memorandum only "goes to the merits of the case" rather than equitable estoppel.[10]

Respondent ignores that the very affidavits and arguments used by the defendant to establish "notice posting" also establish the company's *knowledge of the ADEA* prohibitions, and thus support the legitimate inference *before the jury* that the company well-knew the age discrimination policy espoused by the Memo subjected the company to liability under the Act, so the company also *wrote out* the plan to conceal it. The *jury* must decide if the Memo's explicit directives that the memo should be "Read and Destroyed," that the memo must be kept "Confidential," and that "problem-age employees" will thus be kept "none the wiser" as to the illegal plan, was "designed" to "deceive or mislead the plaintiff in order to conceal the existence of a cause of action," or lull him and others not to pursue their ADEA rights. Judge Magnuson found such explicit directives clearly supportive of equitable tolling/estoppel. Thus, it is the concealment in the Hill Memo, not the

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[10] Of course, this ignores this Court's decision in *Glus*, to the effect that "no man may profit from his own wrong," ignores that equitable estoppel requires only a showing of "some misconduct by the employer."

"offensive nature" of the discriminatory plan, that raises the triable factual issue on equitable tolling/estoppel.

III. & IV. THE ERISA AND STATE LAW CLAIMS

The same arguments against summary judgment on the ADEA claims likewise compel full review and reinstatement of petitioner's ERISA and common-law claims.

V. THE STANDARD OF REVIEW IS NOT "CLEARLY ERRONEOUS."

Respondent's argument that the clearly erroneous standard applies is important, as mentioned earlier, because it shows that respondent believes *the trial court did engage in fact-finding*. Respondent's eleventh-hour attempt to "change history" on the applicable standard of review was conclusively disproved by the standard of review set forth at *six* (6) different times and places.[11]

Plainly, there is no mention whatsoever in the district court's opinion that there had been an evidentiary hearing, or that the district court somehow considered itself acting as a "finder of fact" so as to trigger the Rule 52 "clearly erroneous standard." The fact respondent finds itself compelled to go to great lengths to try to transform this summary judgment case into a "trial" on the statute of limitations issue *speaks volumes* for the exact point petitioners are trying to make in this Petition – the district court went too far and violated summary judgment standards. Unlike *Hrzenak v. White-Westinghouse Appliance Company*, 682 F.2d 714 (8th Cir. 1982), the plaintiff therein "consented to a pretrial evidentiary hearing on the tolling issue." Here, Heideman did not. On appeal in *Hrzenak*, the Eighth Circuit held that the proceeding below was not "one for summary judgment," but was "a trial on the factual issues underlying Hrzenak's claim for equitable tolling." *Id.*, at 718. The proceeding in *Hrzenak* thus could be treated as a trial because

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[11] (1) PFL's Suggestions in Support of its Motion for Summary Judgment; (2) Plaintiff's Suggestions in Opposition in the district court; (3) the district court opinion itself; (4) in Appellant's Brief in the Eighth Circuit; (5) in PFL's Brief in the Eighth Circuit; (6) finally, in the Eighth Circuit's Opinion rejecting defendant's argument to change the Standard of Review.

– totally unlike this situation – "both parties treated the proceeding as a trial on the factual issues underlying Hrzenak's claim for equitable tolling." *Id.*

On page 28, respondent presses on, stating, "at no time up to the present have petitioners argued that they did not have an adequate opportunity to present all of their evidence on the limitations issue to the district court." *Where has respondent been*? It is petitioners' position, as it has been throughout these proceedings, that they have not had *any opportunity* – much less an "adequate opportunity" – to present evidence on the limitations issue to the district court.

Finally, it is nothing short of fraudulent for the respondent to make its last pitch, that the parties and the district court "consented to and treated the proceedings below as a separate trial on the merits to the court pursuant to Rule 42(b)." The Eighth Circuit rejected this argument, this Court should do so as well – *but* note what admission of trial court overreaching lies beneath the desperation. Petitioners were subjected to nothing more than a "paper trial," which this Court's decisions say is an improper use of summary judgment.

CONCLUSION

Petitioners again respectfully request that a Petition for Writ of Certiorari issue to review the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted,

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